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HON. FREDERICK P. CORBIT

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

In re:
GIGA WATT, INC.

CASE NO. 18-03197-FPC11

REPLY MEMORANDUM OF
AUTHORITIES IN RESPONSE TO
DEBTOR'S AND COMMITTEE'S
OBJECTION TO MOTION FOR RELIEF
FROM STAY; ABANDONMENT; AND
REJECTION OF UNEXPIRED
COMMERCIAL LEASES

Debtor in Possession

Giga Plex, LLC and MLDC1, LLC, ("Creditors" or "Landlords") by and through its counsel of record, submits the following Memorandum of Authorities in Response to Debtor's and Committee's Objection to Motion for Relief from Stay; Abandonment; and Rejection of Unexpired Commercial Leases.

REPLY MEMORANDUM OF AUTHORITIES IN
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1 The Debtor in Possession (“Debtor”) in its Objection to Motion for Relief from Stay
2 uses inflammatory language decrying that Creditors’ motion for relief from stay is “devoid of
3 facts and law,” however, Debtor neglects to detail in its objection that Creditors’ Motion for
4 Relief from Stay was filed solely due to the Debtors lack of assurances provided and Creditors’
5 lack of faith in the Debtors ability to reorganize, given its previous actions. As correctly
6 pointed out by the Committee’s Objection to Giga Plex’s Omnibus Substantive Motion, the
7 ability of the Debtor to reorganize within a reasonable time is the cornerstone of the chapter
8 11 bankruptcy process. *See United Sav. Assoc. of Texas v. Timbers of Inwood Forest Assoc.,*
9 *Ltd.*, 484 U.S. 365, 376 (1988).

11 Many if not all creditors in this bankruptcy case are frustrated and concerned about the
12 actions of the Debtor or the lack thereof. Further, the Committee’s objection references
13 appointment of a Chapter 11 trustee. The primary reasons for a Chapter 11 trustee
14 appointment are "for cause, including fraud, dishonesty, incompetence, or gross
15 mismanagement . . . or similar cause." *In re Marvel Entm't Grp.*, 140 F.3d 463, 472 (3d Cir.
16 1998).

18 The Meeting of Creditors was rescheduled from January 8, 2019 to January 16, 2019
19 at 3:00 pm due to failure of the Debtor to appear. The debtor in possession (“DIP”) financing
20 motion was denied due to the Court not having enough evidence to evaluate the long-term
21 benefits of approving a DIP loan in light of the budget presented, not having a clear picture of
22 the Debtor’s revenue source, and the fact the DIP loan would have resulted in the Debtor still
23 unable to pay its debts after obtaining the proposed loan. *See* Hearing Minutes, ECF No. 73

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1 at 1:05-1:08. Further, the DIP financing was represented as the only thing preventing the
2 Debtor from chapter 7 liquidation but presumptively it is still operating as a debtor in
3 possession and paying wages and other expenses listed on the proposed budget, but nothing
4 has been paid to Creditors. Like before, Creditors are provided in Debtor's objection
5 unsubstantiated whispers of a "securing financing" and a "Letter of Interest" despite any
6 evidence being provided. *See Debtors Objection to Motion for Relief from Stay*, pg. 6 at 11-
7 16.
8

9 Creditor's counsel has diligently tried to work with Debtor and Debtor's counsel prior
10 to seeking relief from stay. Creditors offered to be paid in cryptocurrency to ease the burden
11 of converting the cryptocurrency to traditional currency, but nothing has been provided,
12 despite Debtor's unfiled statement that it holds roughly \$300,000.00 worth of cryptocurrency
13 in its possession at the time. The Interim Order for Cash Collateral was signed by this Court
14 on December 17, 2018. This order provided that all rents, electricity and utility owed to
15 Creditor will be paid on time in the Debtor's ordinary course of business. ECF No. 53, pg. 8,
16 23-24. Three days later, a Motion for Debtor in Possession Financing was filed, proposing to
17 prime the replacement lien agreed upon by the parties only days earlier. Further, the term
18 sheet attached to the Motion for Debtor in Possession Financing was dated the same day as
19 this Court's Order. *See Exhibit A – Term Sheet* pg. 2, ECF No. 58-1.
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22 Creditors cannot be compelled to extend credit to the Debtor or pay for electricity that
23 the Debtor is obligated to pay under its commercial leases, the Bankruptcy Code, or this
24 Court's Interim Order. However, Creditors submit this memorandum as an opportunity to
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1 brief this Court and the parties as to why relief from stay should be granted, and why
2 continuing this matter only allows the debtor more time to adjust this Court's cash collateral
3 order and scheduling order without any meaningful explanation.

4 **A. Adequate Protection**

5 *i. Cause*

6
7 11 U.S.C. § 362 (d) provides in pertinent part: On request of a party in interest and
8 after notice and a hearing, the court shall grant relief from the stay provided under subsection
9 (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -
10 (1) for cause, including the lack of adequate protection of an interest in property of such party
11 in interest...

12 Adequate protection requires that a secured creditor receive essentially what it
13 bargained for. *In re Colrud*, 45 BR 169, 174 (Bankr. D. Alaska 1984) citing H. Rep. No. 95-
14 595, 95th Cong., 1st Sess. 339 (1977). The most common form of adequate protection for a
15 secured creditor where the value of said property decreases is periodic payments sufficient to
16 pay the creditors claim in full with interest. *See* 11 U.S.C. § 361(1). Here, this has not been
17 offered despite being requested by Creditors.

18
19 Second, Debtor and Creditor negotiated a replacement lien under subsection (2) under
20 Section 361, through this Court's Interim Cash Collateral Order. However, Debtor's
21 financing motion through the proposed priming lien eviscerated Creditors' faith that any
22 replacement lien would adequately protect its interest.
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1 Given the prior options failed, the adequate protection sought would be under
2 subsection (3) of Section 361, requiring the secured creditor receive its “indubitable
3 equivalent.” *In re Colrud*, 45 BR at 174.

4 Debtor and the Committee argue that Creditors have equity in the personal property
5 assets (based on the prima facie but believed to be inflated values in Debtor’s schedules) and
6 therefore Creditors are adequately protected. However, despite the Debtors and the
7 Committee’s assertions, equitable considerations other than the equity cushion must be taken
8 into account in determining if the creditor is adequately protected.” *Id.* citing (*In re*
9 *Mellor*, 734 F.2d 1396 (9th Cir. 1984); *In re American Mariner Industries, Inc.*, 734 F.2d 426
10 (9th Cir. 1984)).

11 Equitable considerations allow this Court to take into consideration all the facts and
12 circumstances of this case. *In re Colrud*, 45 BR at 175. A poignant question that should be
13 asked of the Debtor is why it cannot afford to pay its post-petition obligations under 11 U.S.C.
14 § 365(d)(3) or comply with this Court’s Interim Cash Collateral Order? Given the budget
15 attached to the Motion for Interim Cash Collateral and the subsequent Monthly Operating
16 Report (ECF No. 64) there should be funds available to pay Creditors *something*, but nothing
17 has been forthcoming. Why?

18 Further, no evidence of what cryptocurrency has been generated since the time of filing
19 has been provided to this court. As provided in the Declaration of Ryan Oster (ECF No 66),
20 as of December 20, 2018, the Debtor should have generated over \$600,000.00 in
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1 cryptocurrency in Giga Plex, LLC and MLDC1, LLC alone. Where has the cryptocurrency
2 generated by the Debtor gone if not to Creditors pursuant to the Court's previous order?

3 For all of these reasons, the crux being that Creditors have no idea when and how it
4 will receive its indubitable equivalent, Creditors respectfully request this Court grants its
5 Motion for Relief from Stay or in the alternative modify the stay to afford Creditors its
6 indubitable equivalent. *See In re Colrud*, 45 BR at 177.

8 *ii. Valuation*

9 Creditors are currently pursuing valuation of the personal property assets at the Giga
10 Plex, LLC and MLDC1, LLC facilities. The valuation placed in the Debtor's schedules for
11 the Moses Lake locations (the Giga Plex, LLC and MLDC1, LLC facilities) was listed as
12 Unknown. ECF No. 40, pg. 6, at 55.5. In fact, the Debtor's Schedules and the Statement of
13 Affairs are woefully incomplete. (i.e. Statement of Financial Affairs, Part 1 Gross revenue
14 from business –Unknown – To be Supplemented; Statement of Financial Affairs, Part 4,
15 Transfers that benefited any insider – To be supplemented). Further, Creditors are learning
16 for the first time in Debtor's objection about "minor liens" in the collateral which would also
17 affect valuation. *See Debtors Objection to Motion for Relief from Stay*, pg. 3, para. 10.

18 The Debtor's Motion for Order Authorizing Use of Cash Collateral then places an
19 estimated value of the non-cash collateral assets at \$30 million without any specific evidence.
20 ECF No. 30, pg. 4 at 1-3. This value is believed to be inflated and inaccurate given the age
21 of the infrastructure and gigapods and the condition in which they have been left.

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1 Debtor in its present objection, now estimates the value of the personal property assets
2 at the Giga Plex, LLC and MLDC1, LLC facilities at 22 million without further evidence.
3 (ECF No. 96, Para. 9). Debtor's objection also states that Creditors assert a \$8 million for the
4 personal property assets without further evidence. This valuation was mentioned in passing
5 and is not for the personal property itself but for Giga Plex, LLC as a going concern. It is
6 believed that no valuation or formal appraisal of the personal property assets has been obtained
7 as of the date of this reply. Although a formal appraisal of the personal property by the
8 Creditors is believed to be forthcoming, it is on information and belief that the personal
9 property values of \$30 million or \$22 million are not an accurate representation of the value
10 of the personal property assets at the Giga Plex, LLC and MLDC1, LLC facilities, particularly
11 because the power has been turned off.
12

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14 Because of the volatile nature of the cryptocurrency business, and the newer gigapod
15 technology coming to market, Creditors are hesitant to put forth a value in the personal
16 property assets unless provided by a licensed appraiser familiar with the cryptocurrency
17 market. To this end, Creditors dispute the value placed on the collateral in Debtor's schedules
18 and requests documentation of the Debtors valuation referenced in its objection. ECF No. 96,
19 Para. 9. The truest example of valuation is a willing seller and willing buyer. If Creditor's
20 Motion for Relief from Stay were granted, under a commercially reasonable Article 9 public
21 sale, the Debtor would be entitled to the surplus from the sale of the personal property assets.
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1 **B. Abandonment**

2 Property that is abandoned pursuant to 11 U.S.C. § 554 is no longer property of the
3 estate and becomes part of the debtor's nonbankruptcy estate. Abandonment under any 11
4 U.S.C. § 554 will be to a party with a "possessory interest" which is defined as a "right to
5 exert control over" or a "right to possess" property "to the exclusion of others." *In re*
6 *Jandous Elec. Constr. Corp.*, 96 B.R. 462, 466 (Bankr. S.D.N.Y. 1989) ; *see also In re First*
7 *Magnus Fin. Corp.*, No. 4:07-bk-01578-JMM, 2008 Bankr. LEXIS 3207, at *15 (Bankr. D.
8 Ariz. Nov. 25, 2008) (unpublished) ("The legislative history and weight of authority holds
9 that abandonment to a third party with a possessory interest is entirely proper.")
10 Abandonment is not the equivalent of a judicial sale, however, and any secured creditor or
11 lessor must thereafter comply with state law foreclosure or forfeiture requirements. *In re*
12 *First Magnus Fin. Corp.* at *15. Here, if the Creditors would have constructive possession
13 of the personal property, Creditors could utilize the Article 9 process which would result in a
14 true valuation of the collateral and net benefit to the Debtor and its creditors.
15

16 Despite the Committee's assertions, abandonment is frequently requested in a relief
17 from stay motion and can be combined with a motion for relief from stay under Local Rules.
18 *See* LBR 4001-1(e). Despite the Committee's assertion otherwise, Creditors did provide
19 copies of documents evidencing the interest of the requesting party (i.e. commercial leases).
20 *See* LBR 6007-1(b). Further, abandonment to the possession of Creditors is a viable request
21 which would benefit all parties in interest given the Debtor's non-response to Creditors'
22 attempts to resolve the matter making the motion for relief from stay a necessity.
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1 Although Creditors concede that combining the motion for rejection of commercial
2 leases may be procedurally flawed, hearing the matter of rejection one day prior to the
3 deadline to accept or reject leases under this Court's Agreed Scheduling Order (January 18,
4 2019) is appropriate given the Debtor has taken no steps to fulfill its post-petition
5 obligations under 11 U.S.C § 365(d)(3) as detailed below. Further, this Court has authority
6 under 11 U.S.C. § 105 to issue any order, process or judgment that it deems necessary.
7

8 **C. Rejection of Lease**

9 11 USC 365 (d)(3) provides:

10 The trustee shall timely perform all the obligations of the debtor, except those
11 specified in section 365(b)(2), arising from and after the order for relief under any
12 unexpired lease of nonresidential real property, until such lease is assumed or
13 rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for
14 cause, the time for performance of any such obligation that arises within 60 days
after the date of the order for relief, but the time for performance shall not be
extended beyond such 60-day period...

15 The sixty (60) day deadline is set to expire on January 18, 2019; however, as the date
16 of this reply, no payments have been made to Creditors. Although this Court can extend the
17 time to comply, "the time for performance shall not be extended beyond such 60-day period."
18 11 U.S.C. §365(d)(3). Creditors have had no assurances that Debtor understands its post-
19 petition obligations. Debtor, in its objection has once again indicated its intention to assume
20 the lease without any meaningful explanation as to why it has not complied with its post-
21 petition obligations under the commercial leases, the Bankruptcy Code and this Court's
22 Interim Cash Collateral Order. *See Debtors Objection to Motion for Relief from Stay*, pg. 6
23 at 11-16.
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1 Finally, Debtor has not paid its post-petition obligations and Creditors cannot be
2 compelled to continue to extend credit to the Debtor or continue to pay the substantial amount
3 of electricity used for cryptocurrency mining. The Motion to Shorten Time was brought
4 because Creditors ongoing obligations for the electricity bills. *See* Declaration of Ryan Oster
5 in Support of the Motion for Relief from Stay, pg. 2, para. 10. Creditors do not have the
6 financial means to do so. Due to nonpayment based on Debtor's failure to pay its post-petition
7 obligations, the Grant County PUD has shut off the power to Creditors' locations.
8

9 For all these reasons, Creditors pray for relief from this Court for the relief from stay
10 and abandonment of the premises back to Creditors, or in the alternative, request this Court
11 modify the stay and make specific findings of what Creditors indubitable equivalent would
12 be. In the event the Debtor cannot produce adequate protection, Creditors respectfully
13 request that this Court deem Creditors' nonresidential leases rejected given the Debtors
14 inability to fulfill its post-petition obligations.
15

16
17 DATED: January 15, 2019

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19
20 /s/ David A. Kazemba
21 David A. Kazemba, WSBA #48049
22 Attorneys for Creditors, Giga Plex, LLC
23 and MLDC1, LLC
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